SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

v.

JAMES F. MARONEY,
SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION
At Pittsburgh, Pennsylvania

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	12
I. Petitioner's Constitutional Right to Effective Assistance of Counsel Was Denied Where Petitioner, an Indigent, Met His Appointed Counsel on the Way to the Courtroom Immediately Prior to Trial	15
A. Late Appointment of Counsel in the Circumstances of This Case Did Not Provide Petitioner with Effective Assistance of Counsel	15
B. The Court of Appeals Erred in Finding That Petitioner Was Not Prejudiced by the Late Appointment of Counsel	21
II. The Seizure of Items from the Automobile in Which Petitioner Was a Passenger Was Unreasonable Because the Police Officers Did Not Have Probable Cause To Arrest Where the Only Information They Had Was a General Nighttime Description of an Automobile and the Number and Race of Its Occupants, and Because the Warrantless Search Took Place After the Occupants of the Automobile and the Automobile Were in Police Custody	26
A. The Police Lacked Probable Cause To Arrest Petitioner	26
B. The Searches and Seizures, Not Being Incident to a Lawful Arrest, Were Unreasonable	31
III. The Admission in Evidence of Dum-dum Bullets Seized from Petitioner's Home Was Not Harmless Error Where the Bullets Were Matched to Those Taken from a Revolver Seized in a Prior Unreason-	

Page

able Search and the Police Officer Was Permitted To Testify Regarding the Effect of Such Bullets on a Human Body 37

CONCLUSION 42

AUTHORITIES CITED

Cases:

Beck v. Ohio, 379 U.S. 89 (1964) 26, 28, 31

Betts v. Brady, 316 U.S. 455 (1942) 23

Calloway v. Powell, 393 F.2d 886 (5th Cir. 1968) 16

Chandler v. Fretag, 348 U.S. 3 (1954) 20

Chapman v. California, 386 U.S. 18 (1967) 20, 39

Chewning v. Cunningham, 368 U.S. 443 (1962) 20

Chimel v. California, 395 U.S. 752 (1969) 33

Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968) 16

Colosimo v. Perini, 415 F.2d 804 (6th Cir. 1969) 34

Commonwealth v. Chambers, 209 Pa. Super. 709, #224 A.2d 371 (1966) 10

Commonwealth v. Smith, 201 Pa. Super. 511, 193 A.2d 778 (1963) 37

Draper v. United States, 358 U.S. 307 (1959) 30, 31

Dyke v. Taylor Implement Mfg. Co., Inc., 391 U.S. 216 (1968) 34

Estes v. Texas, 381 U.S. 532 (1965) 18

Fahy v. Connecticut, 375 U.S. 85 (1963) 39

Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967) 22, 23

Gideon v. Wainwright, 372 U.S. 335 (1963) 12, 15, 20

Glasser v. United States, 315 U.S. 60 (1942) 19

Hawk v. Olsen, 326 U.S. 271 (1945) 16

House v. Mayo, 324 U.S. 42 (1945) 16

In re Murchison, 349 U.S. 133 (1955) 19

Johnson v. Zerbst, 304 U.S. 458 (1938) 15

Page

Ker v. California, 374 U.S. 23 (1963) 30, 37

Mapp v. Ohio, 367 U.S. 643 (1961) 37

Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966) 22, 23

McCray v. Illinois, 386 U.S. 300 (1967) 29, 31

Powell v. Alabama, 287 U.S. 45 (1932) 12, 15, 16, 19

Preston v. United States, 376 U.S. 364 (1964) . . . 14, 31, 33, 36, 37

Reynolds v. Cochran, 365 U.S. 525 (1961) 20

Reece v. Georgia, 350 U.S. 85 (1955) 15

Rideau v. Louisiana, 373 U.S. 723 (1963) 19

Roberts v. Dutton, 368 F.2d 465 (1966) 16

Sheppard v. Maxwell, 384 U.S. 333 (1966) 18

Townsend v. Sain, 372 U.S. 293 (1963) 25, 39

Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967) 22

United States v. Dento, 382 F.2d 361 (3d Cir. 1967) 31

United States ex rel. Chambers v. Maroney, 281 F.Supp. 96 (W.D. Pa. 1968) 11

United States ex rel. Chambers v. Maroney, 408 F.2d 1186 (3d Cir. 1968), *cert. granted*, 396 U.S. 900 (1969) (No. 81, Misc.; renumbered 830 October Term 1969) 11

United States v. Holsey, 414 F.2d 458 (10th Cir. 1969) 34

United States ex rel. Mathis v. Rundle, 394 F.2d 748 (3d Cir. 1968) 17, 21

United States v. Wade, 388 U.S. 218 (1967) 20

White v. Maryland, 373 U.S. 59 (1963) 20

White v. Ragen, 324 U.S. 760 (1945) 16

Wood v. Crouse, 417 F.2d 394 (10th Cir. 1969) 34

Constitution, State Statutes and Court Rules:

United States Constitution, amend. IV 2

United States Constitution, amend. VI 2

United States Constitution, amend. XIV, § 1 2

Fed. R. Crim. P. 41(e) 26

	Page
Act of June 24, 1939, P.L. 872 § 705, 18 Purdon's Pa.	3
Stat. Anno. § 4705 (1963)	3
Act of June 24, 1939, P.L. 872 § 817, as amended, 18	3
Purdon's Pa. Stat. Anno. § 4817 (1963)	3
Pa. R. Crim. P. 2001(b)	26
Miscellaneous:	
Report on Criminal Justice Act, 36 F.R.D. 277, 338-341 (1965)	16

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OPINIONS BELOW

The opinion of the district court (A. 308-315, inclusive) is reported at 281 F. Supp. 96 (W.D. Pa. 1968). The opinion of the court of appeals (A. 320-336, inclusive) is reported at 408 F.2d 1186 (3rd Cir. 1969).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1969 (A. 337). A petition for rehearing was denied on March 17, 1969. The petition, in forma pauperis, for a writ of certiorari was filed in this court on Novem-

ber 10, 1969; the writ was granted on November 10, 1969 (396 U.S. 900). The jurisdiction of this court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether petitioner was deprived of effective assistance of counsel within the meaning of the Sixth and Fourteenth Amendments where he met his appointed counsel for the first time on the way to a courtroom for trial on serious criminal charges?

2. Whether the warrantless search of an automobile was reasonable where the search and seizure of weapons and evidence took place after the occupants were in police custody in the precinct house, the automobile had been removed from the place of arrest to the police station driveway and had already been searched twice, once at the arrest scene and once at the police station?

3. Whether the admission into evidence of dum-dum bullets, wrongfully seized from petitioner's residence, was harmless error where the bullets were matched to those taken from a revolver seized from an automobile in which petitioner was a passenger and a police officer was permitted to testify regarding the damage inflicted by such bullets?

STATEMENT OF THE CASE

During the first week of September 1963, petitioner and three co-defendants, Raymond Lawson, Henry Ramsey and Joseph Jackson, were tried on charges of armed robberies[1] and receiving stolen goods[2] arising out of holdups of two automobile service stations on May 13, 1963[3] and May 20,

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[1]Act of June 24, 1939, P.L. 872 § 705, 18 Purdon's Pa. Stat. Anno. § 4705 (1963), a felony, authorizing maximum penalties of $10,000.00 fine and twenty years imprisonment upon each conviction.

[2]Act of June 24, 1939, P.L. 872 § 817, as amended, 18 Purdon's Pa. Stat. Anno. § 4817 (1963), a felony, authorizing maximum penalties of $1,000.00 fine and five years imprisonment upon each conviction.

[3]Indictments at No. 78 June Sessions, 1963, Court of Oyer and Terminer and General Jail Delivery at Allegheny County, Pennsylvania.

1963,[4] respectively, providing potential total sentences of fifty years imprisonment and thirty thousand dollars ($30,000.00) in fines. Petitioner was represented by an attorney on the staff of the Legal Aid Society of Pittsburgh (A. 35, 266). That trial ended in the withdrawal of a juror and a declaration of a mistrial (A. 266).

On September 27, 1963, the case was called for a second trial before Judge J. Frank Graff and a jury. Judge Graff had not presided over the earlier trial. Enroute to the courtroom that morning, petitioner met Vincent Tamburo, Esq., the attorney who was to represent him at the trial (A. 256). Mr. Tamburo, also a member of the Legal Aid Society of Pittsburgh, was not the attorney who had represented petitioner at the first trial; nor had he previously met with petitioner (A. 255, 256, 266). Mr. Tamburo joined in, but did not argue in support of, a motion to sever the indictments. The trial judge denied this request for separate trials (A. 18, 19).

The trial testimony established that on May 13, 1963 between 2:20 and 2:30 a.m., two negroes walked in the front door of a Boron automobile service station in Turtle Creek Borough, Allegheny County, Pennsylvania, and asked Raymond Havicon, the station manager, for change (A. 20). When Havicon gave the men change, one of them displayed a nickel plated .38 caliber revolver and demanded that Havicon give them everything he had (A. 20, 22). Approximately $66.00 in cash, an automobile driver's license, an automobile owner's card and club cards were taken (A. 21).

Havicon identified a nickel plated .38 caliber revolver found in the vent of Lawson's stationwagon as looking like the gun with which he had been threatened. He also identified as his property, four cards taken with his wallet, also removed from the stationwagon. Havicon made an in-court identification of petitioner as the man who had threatened him with the gun during the robbery (A. 22-24 inclusive).

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[4] Indictments at No. 91 June Sessions, 1963 in the same court.

[continued]

On cross-examination, petitioner's counsel elicited the fact that Havicon had previously identified petitioner at the McKeesport police station about ten or twelve days after the robbery. Petitioner had been shown to Havicon in a four-man "line-up" consisting only of petitioner and the other three defendants (A. 32-34 inclusive, 36, 37, 109, 110). Petitioner's counsel then asked Havicon, "Didn't one of the detectives actually tell you that was the man with the fun?" After Havicon's negative answer, the following colloquy ensued:

> "The Court: I take it you will be able to disprove that, will you?
>
> Mr. Tamburo: What?
>
> The Court: You shouldn't ask that question unless you are prepared to disprove that, contradict him.
>
> Mr. Tamburo: I have the defendant's testimony.
>
> The Court: Disprove it in any way at all.
>
> Mr. Means (prosecutor): I don't understand how the defendant would know what the detectives told him.
>
> The Court: He said he is going to disprove it by the defendant, that's all right, go ahead.
>
> Mr. Tamburo: I am trying to develop a line of questioning on cross examination to discredit some of his identification.
>
> The Court: I understand what you are doing, I am only making a statement that you shouldn't ask questions which, if he denies, you are not prepared to disprove.
>
> Mr. Tamburo: I see." (A. 34)

Immediately thereafter, the prosecution had Officer Reddington, who was present at the stationhouse identification, testify that he did not tell Havicon whom to select from the "line-up." Mr. Tamburo did not cross-examine (A. 37).

It was further established that on May 20, 1963, at approximately 11:25 or 11:30 o'clock p.m., fourteen year old Linda Oschinick and her seventeen year old boyfriend, Jerry Klaus, observed a light blue stationwagon, occupied by four negro men, in a parking lot approximately one block from the Oschinick home in North Braddock Borough, Allegheny County (A. 39-43, inclusive, 49-52, inclusive). Thereafter, they observed the blue stationwagon circling the block encompassing the Oschinick home, the parking lot and a Gulf automobile service station. The service station could not be seen from the parking lot (A. 103).

At 11:45 o'clock p.m. on May 20, 1963, two men approached Steven Kovacich, the attendant at the Gulf service station in North Braddock and displayed two pistols (A. 53, 54). At their direction, Kovacich delivered to them the money in his cash register and put the coins into his right hand glove (A. 54-55). The shorter of the two men was wearing a green sweater, khaki trousers and hat and held a chrome revolver. He had a mustache (A. 57). The taller man was wearing a cap and trench coat and also had a mustache (A. 57, 58). After the two men left, Kovacich telephoned the police (A. 59, 60).

At trial, Kovacich could not identify any of the four defendants but testified that he identified petitioner in a four man "line-up" at the police station the day after the robbery (A. 59). Kovacich stated that $85.00 had been taken from him. Lawson's attorney, referring to Kovacich's testimony at the first trial, questioned him about his prior testimony that $211.00 had been taken (A. 64, 65).

At approximately 11:50 o'clock p.m. on May 20, 1963, Oschinick and Klaus observed a man running from the Gulf service station yelling that there had been a robbery (A. 41, 52). They also saw the same blue stationwagon leaving the parking lot across the street from the service station at a speed of 45 to 50 miles per hour, heading towards Braddock Borough (A. 41, 52). They then walked to the service station and told the police that they had seen the blue

stationwagon (A. 49). They never saw anyone get out of the vehicle and did not identify any of its occupants (A. 50).

At 11:52 o'clock p.m. on May 20, 1963, Lieutenant Wagner of the North Braddock Borough Police received a radio call to proceed to the Gulf service station. He arrived there a few minutes later and talked with Kovacich who described the two men involved in the robbery (A. 84). Wagner also talked with Klaus and Oschinick who gave him a description of the car which was then broadcast on the police radio (A. 85).

Between 12:30 and 12:45 o'clock a.m. on May 21, 1963, Officer Herman of the neighboring Swissvale Borough Police Department received a message on his car radio informing him of a robbery in North Braddock and alerting him to watch for a light blue compact stationwagon occupied by four colored men (A. 70-72, inclusive). He observed a car fitting the description proceeding in the opposite direction and pulled his car into a parking lot to reverse his direction (A. 71). In the parking lot, Herman met his brother officer, Hagan, who called his desk sergeant to verify the description of the vehicle. Herman and Hagan then followed the stationwagon into Rankin Borough where they stopped it in a parking lot on a side street, because of the traffic (A. 71, 72, 77, 78). The stationwagon had been travelling towards the scene of the robbery (A. 75).

Officers Herman and Hagan ordered petitioner, Lawson, Jackson and Ramsey out of the car and conducted a search of their persons. No weapons were found (A. 72, 74). Lieutenant Wagner, who had been informed of the arrest, drove to the scene. Together with Lieutenant Payne of the neighboring Rankin Borough Police, he searched the stationwagon by searchlight (A. 79, 86, 173). A trench coat was found on the seat of the car, and he observed that petitioner was wearing a green sweater (A. 85).

The four defendants were taken to various police stations by the arresting officers. Lawson, the owner of the stationwagon, drove it to the North Braddock police station and

parked it in the station driveway (A. 87, 89, 175). Lawson and petitioner were taken into the police station where they were again searched and money taken from their persons (A. 87, 88). Lieutenant Wagner and Officer Cassidy again searched the stationwagon, "went through everything, but did not find anything" (A. 89, 107, 108.) They returned to the police station and talked with petitioner and Lawson who did not give them any additional information (A. 89, 107). They then proceeded to again search the stationwagon (A. 89, 90, 107, 108). During the course of this search, Officer Cassidy opened a vent under the dashboard and found two .38 caliber revolvers, one of which was loaded with four dum-dum bullets (A. 132, 133), a glove full of coins, three automobile operator's permits and a club membership card (A. 90, 91, 96, 97, 107, 108).

On May 21, 1963, James Haverly, Assistant Chief of the North Braddock Police Department, obtained a search warrant to search the homes of the four defendants (A. 126). A search of the homes of Lawson, Jackson and Ramsey produced nothing (A. 126, 127). A search of petitioner's home, approximately eight hours after the robbery, resulted in the discovery of a brown leather holster, one box of thirty-three .38 caliber Smith & Wesson cartridges and a number of loose .38 caliber cartridges, 42 of which were loaded with dum-dum bullets (A. 127, 128, 131).

Petitioner's counsel objected to the admission of the bullets, pointing out that at the first trial:

> ". . . it was objected to and the objection was sustained, and I would also like to object to it now, I don't think it is good for the jury to hear it. I don't feel there is any relevancy or connection between the fact there were .38 caliber bullets at his home and the fact that a .38 caliber gun was found, not on the person of Chambers, but in the group." (A. 82).

After reserving decision, the court overruled the objection (A. 128, 129). The bullets not only were admitted but

Officer Haverly testified to the peculiar nature of dum-dum bullets, which, unlike ordinary bullets, tear a larger hole in the body while exiting from it (A. 128).

Petitioner's counsel renewed his objection to the admission of the bullets on the grounds that the search warrant did not "indicate any reasonable ground for the officers to come into Chambers' house," and did not "set forth specifically what they are looking for." (A. 130). The following colloquy took place:

> "The Court: Well, of course, you have known about this from the other trial three weeks ago.
>
> Mr. Tamburo: I wasn't the attorney at the other trial.
>
> The Court: But, you knew about it?
>
> Mr. Tamburo: I didn't know a thing about the search warrant until this morning.
>
> The Court: You knew about the evidence about to be introduced, you told me about it.
>
> Mr. Tamburo: It wasn't admitted.
>
> The Court: That doesn't mean I have to exclude it now.
>
> You have not conformed to the rules of the Superior Court with the suppression of evidence. There are recent rulings by the Superior Court which says what you have got to do, you haven't done it. I think there is reasonable ground for making a search here, even without a Warrant, and that's also a preliminary matter. We overrule the objection and allow an exception." (A. 130, 131)

Only Lawson testified in his own defense. He described how Kovacich had identified petitioner at the station house but had been unable to identify anyone else. He admitted being in the car on May 20 and 21 but claimed that if anything had happened with respect to robbery, he was unaware of it because he had been asleep in the back of the

car. He admitted to a prior conviction for murder in the second degree and to having pleaded guilty to charges of attempt with intent to kill, assault with intent to maim, pointing deadly weapons and carrying firearms without a license (A. 181, 182).

The jury returned verdicts convicting petitioner and Lawson of both counts at No. 78 June Sessions, 1963 and convicting the four defendants at No. 91 June Sessions, 1963 (A. 236). On January 24, 1964, Chambers was sentenced to a term of four to eight years on the charges at No. 78 and a term of two to seven years on the charges at No. 91. No post trial motions were filed by or on behalf of petitioner (A. 265, 266).

A little more than two years after his conviction, petitioner filed a pro se petition for a writ of habeas corpus in the Court of Common Pleas of Allegheny county[5] alleging in addition to three claims of unconstitutional search and seizure, a claim that the late appointment of trial counsel deprived him of the effective assistance of counsel (A. 237, 241-245, inclusive). At the hearing on this petition, trial judge Graff presided and petitioner was again represented by an attorney on the staff of the Legal Aid Society of Pittsburgh (A. 239, 327, n. 15). Petitioner testified that he had met his trial counsel on the way to the courtroom on the morning of the trial. The petition was denied.[6]

After exhausting his state appellate remedies, petitioner filed a pro se petition for writ of habeas corpus in federal court containing allegations similar to those presented in state court.[7] The district court did not assign counsel and

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[5]No. 1988 January Term, 1966.

[6]Affirmed, *Commonwealth v. Chambers,* 209 Pa. Super. 709, 224 A.2d 371 (1966), Hoffman, J., dissenting, would remand for a hearing on the constitutional question, allocatur denied by the Pennsylvania Supreme Court.

[7]*United States ex rel. Chambers v. Maroney,* No. 67-1050, in the United States District Court for the Western District of Pennsylvania.

no evidentiary hearing was held. After hearing oral argument by the state, the court denied the petition, devoting one paragraph to petitioner's claim of ineffective representation. The court found, however, that there was evidence:

> ". . . tending to show that relator's counsel had no knowledge of any possible impropriety in the manner in which the bullets were seized until the time when they were offered," and that
>
> ". . . he was misled by the exclusion of the bullets at the prior trial into believing that upon objection they likewise would be excluded at the second trial."[8]

On appeal, the court of appeals affirmed,[9] holding for the first time, that the presumption of ineffective representation as a result of belated appointment of counsel could be rebutted not only by evidence produced by the state in an evidentiary hearing but also by *adequate* affirmative proof *otherwise* appearing in the record demonstrating that the appellant was not prejudiced. Assuming that petitioner's claim of ineffective representation related only to the search and seizure claims,[10] the court decided those claims adversely to petitioner, stating that:

> "This is not a case where belated appointment of counsel may have resulted in the failure to call witnesses whose availability the defendant did not have a chance to disclose to his counsel or where there was insufficient time to call them, or in the

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[8] 281 F.Supp. 96, 98 (W.D. Pa. 1968). In his petition to the district court, however, petitioner states that he was without counsel prior to trial. Counsel was designated to represent petitioner enroute to the courtroom on the day of the trial. This belated appointment rendered counsel's services ineffective, opportunities of pre-trial motions or hearings and discovery opportunities, which in itself is a denial of equal protection and due process of law. (A. 278-287, inclusive).

[9] 408 F.2d 1186 (3rd Cir. 1969).

[10] *Id.* at 1191.

> failure to raise defenses to which counsel was unaware or which he was unprepared to pursue, or in an improvident plea of guilty. At most counsel failed to file pre-trial suppression motions with respect to certain evidence secured by police searches.[11]

Thereafter, petitioner personally filed his petition for writ of certiorari in this court, and the writ was granted November 10, 1969.

SUMMARY OF ARGUMENT

I

Petitioner's right to effective assistance of counsel was denied where he first met his appointed lawyer on the way to the courtroom for trial on felony charges.

A. The court of appeals erred in determining that petitioner would have been deprived of effective assistance of counsel only if the court found actual prejudice from the late appointment. This Court, on prior occasions, has foreclosed inquiry into the possibility of prejudice when discussing alleged violations of the accused's right to effective assistance of counsel. *Powell v. Alabama,* 287 U.S. 45 (1932). To make effective the right to counsel guaranteed by *Gideon v. Wainwright,* 372 U.S. 335 (1963), this Court should hold that late appointment, in the circumstances of this case, was no appointment.

B. The court of appeals erred in failing to find that petitioner had suffered actual prejudice by the late appointment of counsel. The court below adopted a rule, first promulgated in the fourth circuit, that where there has been late appointment of counsel the burden of proving that the habeas corpus applicant was not prejudiced thereby shifts to the state, which may satisfy this burden by *adequate* affirmative evidence of lack of prejudice from the record.

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[11] *Id.* at 1195, 1196.

That burden is too light. We submit that adequate affirmative evidence is insufficient to show that a fundamental constitutional right has not been violated. In any event, however, the record establishes actual prejudice to petitioner.

II

The seizure of items from an automobile in which petitioner had been a passenger was unreasonable because the arresting police officers did not have probable cause to arrest and the search conducted without warrant was not incident to the arrest.

A. The police officers lacked probable cause for the arrest. The arresting police officers had been advised of a robbery committed by two men in a neighboring community forty-five minutes to one hour before they stopped the automobile in which petitioner was a passenger and made the arrest. The only information the officers possessed was supplied by informants of unknown reliability. These informants had seen a light blue stationwagon with four negro occupants parked across the street from the scene of the robbery and had witnessed it being operated from that place at about the time of the offense. At the time of arrest petitioner was one of four male negro occupants of a light blue stationwagon. This is not sufficient to establish probable cause.

B. The search and seizure from the automobile was not incident to the arrest. After the automobile had been stopped, petitioner and the other three occupants and the automobile were searched. Petitioner and the owner of the vehicle were taken to a neighboring police station. After questioning these men, and while they were in custody inside the stationhouse, the automobile was thoroughly searched. After further questioning a third search of the automobile was made and items seized. The admission of these items into evidence was a violation of petitioner's fourth and fourteenth amendment rights. The lower court

improperly distinguished *Preston v. United States*, 376 U.S. 364 (1964) which held unreasonable searches and seizures made where the suspect was in custody and there was no danger that any of the men arrested could have used any weapons in the car to assault an officer or escape or could have destroyed evidence.

III

Admission into evidence of dum-dum bullets taken in an unreasonable search and seizure from petitioner's home was harmful error. The lower courts assumed that the dum-dum bullets were taken pursuant to an invalid warrant, but they concluded the constitutional error was harmless beyond a reasonable doubt. The courts mistakenly concluded that the evidence were merely cumulative and that there was other sufficient evidence to convict. These conslusions are not supported by the record, which demonstrates that the bullets were a necessary link in the conviction and formed the basis for prejudicial and inflamatory remarks by a police officer.

ARGUMENT

1

PETITIONER'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHERE PETITIONER, AN INDIGENT, MET HIS APPOINTED COUNSEL ON THE WAY TO THE COURTROOM IMMEDIATELY PRIOR TO TRIAL.

A. Late appointment of counsel in the circumstances of this case did not provide petitioner with effective assistance of counsel.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963) the right to counsel of one charged with a serious crime was held to be fundamental right, essential to a fair trial.[12] In so holding, the Court re-affirmed principles first expressed in *Powell v. Alabama*, 287 U.S. 45 (1932).[13] *Powell*, however, established that the right to counsel was not a hollow one but one which meant the assistance of counsel who was not appointed "at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case:"[14]

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[12]The *Gideon* Court declared: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him". 372 U.S. at 344.

[13]"[The defendant] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. at 68-69.

[14]287 U.S. at 71; see also *Reece v. Georgia*, 350 U.S. 85, 89, 90 (1955); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

The components of the right to *effective* counsel are found in the decisions of this and other courts. The most basic ingredient is time. *Hawk v. Olson,* 326 U.S. 271, 278 (1945). Time means adequate opportunity to prepare for trial. *White v. Ragen,* 324 U.S. 760, 763, 764 (1945). Preparation for trial assumes adequate consultation with the defendant. *House v. Mayo,* 324 U.S. 42, 45, 46 (1945), and contemplates adequate investigation into the facts of the case. *Powell v. Alabama, supra,* 287 U.S. at 58. Counsel must consider the existence of various possible defenses. *Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir. 1968).[15] He must ponder whether constitutional issues exist and the necessity for legal research. *Roberts v. Dutton,* 368 F.2d 465 (5th Cir. 1966).[16]

The vast panoply of pre-trial motions available in a modern day criminal proceeding and which may affect the most critical phases of the case must be weighed and, where appropriate, pursued. Counsel must consider the numerous options available to the defendant and must consult with him concerning them. *Calloway v. Powell,* 393 F.2d 886, 888 (5th Cir. 1968).

Without counsel at pre-trial stages of the action against him, an accused is unable to determine if his arrest was lawful; the propriety of identification procedures; the validity of complaint and indictment procedures; the existence of

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[15] "Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigation, both factual and legal, to determine if matters of defense can be developed, and to allow him enough time for reflection and preparation for trial."

[16] Report on Criminal Justice Act, 36 F.R.D. 277, 338-341, inclusive (1965) contains a checklist of preparatory steps to be performed by counsel under the Act and suggests many of the matters counsel should consider.

reasonable cause for searches and seizures; and whether any of those procedures should or must, under pain of waiver, be tested by preliminary motion.

An accused cannot analyze the law applicable to charges against him; nor can he weigh the legal implications of a conviction. He is unable to consider effectively a plea of guilty and any possible bargaining in connection therewith. If petitioner does not have the assistance of counsel at any of these critical times, he has not had effective assistance of counsel.

The decision of the court of appeals in this case followed its decision in the *United States ex rel. Mathis v. Rundle*, 394 F.2d 748 (3rd Cir. 1968), holding that the district court properly dismissed petitioner's application for writ of habeas corpus after determining that petitioner had not been *actually* prejudiced by the late appointment of counsel. This holding is inconsistent with a long line of decisions of this Court and other federal courts which hold that the mere danger of prejudice from an infringed right to counsel is the appropriate determination for protecting a defendant's right to counsel.

Petitioner met his appointed lawyer for the first time enroute to the courtroom for trial on criminal charges which could have resulted in fifty years imprisonment and total fines of thirty thousand dollars. We are unable to determine from the record, what, if any, preparations counsel made prior to trial. We do know, however, that his failure to file pre-trial motions to suppress[17] resulted in the introduction of evidence which, as hereinafter indicated, should have been excluded.

We may infer from the record that counsel had insufficient time to confer with his colleagues and with petitioner. Had counsel talked with the lawyers for the other defend-

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[17]The trial judge overruled the objection to the evidence on the procedural grounds that it was not made timely (A. 130, 131).

ants he would have learned that one of them, counsel for Lawson, had available the notes from the previous mistrial. From those notes petitioner's counsel could have learned the bases for the exclusion of evidence seized in a search of petitioner's home. From this same counselor, he would have learned that Lawson would take the witness stand in his own defense and admit to a conviction for second degree murder (A. 182) and having pleaded guilty to charges of attempt with intent to kill, assault with intent to maim, pointing deadly weapons and carrying firearms without a license (A. 182, 183). With this information at his disposal, petitioner's counsel could have cogently argued the motion for a separate trial of the charges against petitioner. Instead, he merely joined in the motion, without comment (A. 18). How could counsel have adequately discussed the alternatives of jury trial versus non-jury trial on the way to the courtroom; or other alternatives—whether petitioner should testify, testimony of possible witnesses or plea bargaining in the circumstances?

Adequate time to prepare would have enabled counsel to assert timely and valid objections to introduction of the revolvers and cards into evidence, which he was unable to do at trial. That petitioner was exposed to more than the mere danger of prejudice is self evident. The indigent's right to the assistance of counsel, guaranteed by *Gideon, supra.* can only be meaningful if counsel has sufficient time to inform himself of his client's case to which he has been assigned to reflect upon it and to prepare for trial. Appointment of counsel in this case on the way to the courtroom foreclosed inquiry and reflection and highlights the premise that *late appointment is no appointment.*

In other cases, involving the right to a fair trial, this Court has refused to consider whether in a particular case the defendant has been *actually* prejudiced by a challenged practice. These cases are apposite to situations where there has been late appointment of counsel. *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965);

Rideau v. Louisiana, 373 U.S. 723, 727 (1963). This, because

> ". . .our system of law has always endeavored to prevent even the probability of unfairness. '. . . to perform its high function in the best way 'justice' must satisfy the appearance of justice." *In Re Murchison,* 349 U.S. 133, 136 (1955).

This judicial insistence on preventing the existence and appearance of unfairness has been specially strict where the right to counsel has been involved. No component of the concept "effective assistant of counsel" is more obviously absent; none detracts more from the appearance of justice than a lawyer who commences a trial moments after his designation as counsel.

Once the court determined in *Powell v. Alabama, supra,* that appointed counsel proceeded to trial without conducting a thorough investigation of the facts in the case, the deprivation of defendants' right to the effective assistance of counsel. It was as if, in fact, no counsel had been appointed. That no prejudice could be proved had resulted from lack of preparation was deemed irrelevant. 287 U.S. 73-77.

In *Glasser v. United States,* 315 U.S. 60 (1942), this Court considered the matter of prejudice in connection with the Sixth amendment right to counsel where Glasser's attorney was ordered to also defend one of Glasser's co-defendants. In holding that assistance of counsel contemplates unimpaired assistance, free from conflict, this Court stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at one difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amounts of prejudice arising from its denial.*" 315 U.S. at 75, 76 (Emphasis added.)

In a series of cases dealing with the denial of counsel in recidivist proceedings, the Court again foreclosed any at-

tempt to demonstrate that the defendant had not suffered prejudice by virtue of the denial of his right to counsel. *Chewning v. Cunningham,* 368 U.S. 443 (1962); *Reynolds v. Cochran,* 365 U.S. 525 (1961); *Chandler v. Fretag,* 348 U.S. 3 (1954).

> "It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel." 365 U.S. at 531, n. 12.

Where the accused was without counsel at a critical pretrial stage of the proceedings, the Court again disclaimed any interest in a quest for prejudice:

> "We repeat what we said in *Hamilton v. Alabama, supra,* (368 U.S. at 55), that we do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.'" *White v. Maryland,* 373 U.S. 59, 60 (1963).

In *United States v. Wade,* 388 U.S. 219 (1966), the judicial recognition of the critical character of the period of time from arraignment to trial, first expressed in *Powell,* reached its zenith. *Wade* established the right to counsel at a police "line-up", confirming the right solely because of the "potential substantial prejudice" inherent in such a confrontation. 388 U.S. at 227.

Finally, in *Chapman v. California,* 386 U.S. 18 (1967), this Court adopted a federal harmless error rule and observed:

> ". . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ." 386 U.S. at 23, citing in footnote 8, *Gideon v. Wainwright, supra.*

The court of appeals in petitioner's case held that the late appointment of counsel made out a prima facie case of denial of effective counsel, but the denial was rebutted by *adequate* affirmative evidence to rebut the presumption. This was nothing more than a harmless error rule, requiring

only *adequate* proof to show harmlessness. The circuit court *ipse dixit* directly contradicts this Court's command that there be no inquiry into degrees of prejudice from ineffectiveness of counsel. It would dilute *Chapman,* which held that constitutional error can be held harmless only where it is found harmless *beyond a reasonable doubt.*

The possibility of prejudice is so evident in this case that this Court should declare that petitioner was denied the effective assistance of counsel and reverse the denial of the writ of habeas corpus.

B. The court of appeals erred in finding that petitioner was not prejudiced by the late appointment of counsel.

We have asserted that the late appointment of counsel in this case was so inherently prejudicial that specific proof of prejudice is not necessary for reversal. This premise is founded in the many decisions of this Court holding that the Sixth amendment right to "assistance of counsel" is so fundamental that it will not admit of speculation as to possible impairment or lack of effectiveness.

If this Court does not yield to the persuasiveness of this contention, then we submit that the Court will find in this case that (1) petitioner did indeed suffer prejudice because of the late appointment of his counsel; prejudice which, contrary to the findings of the district and circuit courts, exists in the record or (2) the record is, at the least, undeterminative on the issue of prejudice and the court of appeals should not have attempted to determine from the record the manner in which prejudice could not exist.

In *United States ex rel. Mathis v. Rundle,* 394 F.2d 748, 753, 754 (3rd Cir. 1968) the court of appeals fashioned a procedural rule that late appointment of counsel constitutes a prima facie case of ineffective representation, subject to rebuttal by the prosecution through an evidentiary showing

by strong affirmative proof that the late appointment was not inherently prejudicial to defendant.[18]

Mathis can only be accepted if by inherent prejudice the court means that in the short period of time between assignment of counsel and trial, defense counsel pursued all necessary steps in the circumstances of the particular case and that no *possibility* of prejudice existed at any stage of the proceedings.[19]

Moreover, the court of appeals in the instant case has modified *Mathis* to allow rebuttal from the face of the trial record alone[20] by *adequate* affirmative evidence.[21] The trial record, standing alone, will establish only those things recorded during *trial.* It cannot establish what counsel was required to do, and did not do or could not have done in the circumstances of the case; nor what could have been done and was not done prior to trial.

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[18]Following decisions of the court of appeals for the fourth circuit in *Fields v. Peyton,* 375 F.2d 624 (4th Cir. 1967); *Twiford v. Peyton,* 372 F.2d 670 (4th Cir. 1967); *Martin v. Virginia,* 365 F.2d 549 (4th Cir. 1966).

The *Mathis* court obviously understood the problem:

> "Mere appointment before trial of counsel to represent an indigent criminal defendant is not enough. Legal aid must be administered by trial courts for indigents under such conditions that their representation approximates in its vigor, zeal, and thoroughness that of counsel retained and paid by those other defendants who can afford to do so. The need for careful scrutiny in the matter of adequate opportunity for preparation by appointed defenders is certainly as important as any desire to dispose of clogged dockets." 394 F.2d at 753

[19]But the *Mathis* rule does not require inquiry into the possibility of prejudice. Rather it permits the state to rebut the presumption by showing that there was no actual prejudice to defendant.

[20]408 F.2d at 1195.

[21]*Id.* at 1190.

[continued]

To use the cold record alone and decide—not that there was no danger of prejudice from belated assignment—but only that on the claims presented in the record, petitioner was not prejudiced, ignores the obvious fact that the trial record was inadequately protected and wholly silent on the effectiveness of pre-trial preparation. To find that no harm resulted from late appointment is to overlook the unexpressed damage; the possibility of harm, and to return to a purely functional approach, thought to be in repose since the demise of *Betts v. Brady*, 316 U.S. 455 (1942). This holding also violates the spirit of *Chapman v. California, supra*, as it substitutes for the *Chapman* rule for determining harmless error a test requiring only *adequate* proof[22] of no actual prejudice.

Prior to the rules in the instant case, lower federal courts, consistent with the language of *Powell* and its progeny, refrained from considering the probable result of a late appointment of counsel. By considering the probable result in this case, the court of appeals has departed from the very rule which it set out to follow as developed by the fourth circuit and so well expressed by that court in *Martin v. Virgina:*

> "Whether any attorney would actually have advised petitioner differently because of these factors, or others not disclosed in the record, is not the question. The question is not one that can now be answered with any degree of certainty, nor need it be answered. The point is that because of the haste that marked the entire process, this lawyer was in simply no position to evaluate his case and make considered judgments on the matters." 365 F.2d at 553, 554.

If *Martin* is applied to this case, the decision below cannot stand. The court of appeals, relying upon dicta in *Fields v. Peyton, supra*, determined that an evidentiary hearing was not necessary and that the record contained adequate affirmative proof that petitioner had not been

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[22] 408 F.2d at 1190.

prejudiced.[23] The court's findings do not support its conclusion; rather they suggest matters showing identifiable prejudice to petitioner.[24] Accenting the circuit court's technique, additional prejudicial matters are evident in the record.[25]

Had the court of appeals correctly applied *Mathis* it would have found evidence of prejudice to petitioner. The record does not contain "adequate affirmative evidence to

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[23]The court reviewed the record and found: at his first trial petitioner was represented by another member of the Legal Aid Society; an attorney or representative of the Legal Aid may have visited petitioner in jail; petitioner did not have the opportunity to consult previously with *the* counsel who defended him at trial; there was no evidence of what preparation, if any, the attorney made; "counsel was not wholly familiar with all aspects of the case"; counsel was not able to timely file motions to objectionable evidence seized pursuant to an invalid search warrant (disposed of as harmless error); other evidence was seized incident to a lawful arrest.

[24]No opportunity to consult with attorney before trial; no evidence of preparation by attorney; counsel not familiar with all aspects of case (the district court opinion says: "Further, there is evidence tending to show that relator's counsel had no knowledge of any possible impropriety in the manner in which the bullets were seized until the time they were offered." 281 F.Supp. at 98; insufficient time to file pre-trial motions.

[25]Petitioner's counsel joined in a motion to sever the indictments for trial without stating reasons. If he had conferred with his colleagues, he would have known that Lawson was going to take the stand and admit to a conviction of murder in the second degree. Opportunity to prepare motions to suppress would have enabled him to test probable cause for arrest, validity of warrantless search and seizure from car and of specificity of warrant employed to seize evidence from petitioner's home. Counsel was in obvious difficulty when during his cross examination of witness, Havicon, he stated (A. 34) that he would disprove the witness's statements by the petitioner's testimony. Again, with time to prepare he could have obtained the notes of the previous trial to impeach witness Kovacich, as Lawson's counsel was able to do (A. 65-67 inclusive, 204-207, inclusive).

overcome the presumption of harm", it contains abundant evidence of prejudice to petitioner.

If the court could not perceive the affirmative evidence of ineffectiveness of counsel in the record, it should have remanded for evidentiary hearing under the doctrine of *Townsend v. Sain*, 372 U.S. 293 (1963), where this Court stated circumstances under which a district court must hold an evidentiary hearing in federal habeas corpus proceedings:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fully supported by the record as a whole; (3) the fact finding procedure employed by the state court was not adequate to afford a fair and full hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts are not adequately to developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." 372 U.S. at 313.

Was the state fact-finding procedure adequate and were the material facts adequately developed if: petitioner's trial counsel did not testify as a witness; the records of the Legal Aid Society were not introduced in the state hearing; the petitioner was not thoroughly examined regarding his discussion, if any, with his attorney and what possible defenses were available to him? There is no explanation of why the other defendants filed post trial motions and the petitioner did not. Indeed there is no showing that the attorney discussed such motions and appeals with petitioner. Omissions in the trial record should have been rectified by facts developed at a hearing—not by presumptions.

Townsend teaches that the district judge may rely upon relevant facts found by a state court judge in habeas corpus hearing but cannot defer to state court conclusions of law. The state court erred in concluding that petitioner had no standing to raise an objection at trial to the search and seizure of items from the stationwagon since the proper procedure was pre-trial motion to suppress and its timely

filing could not be waived, citing Federal Rule of Criminal Procedure 41(e).[26]

The court of appeals, therefore, erred in not reversing the denial of the writ of habeas corpus, or minimally, in failing to remand the case to the district court to hold a full evidentiary hearing to determine the facts in connection with petitioner's habeas corpus petition.

II.

THE SEIZURE OF ITEMS FROM THE AUTOMOBILE IN WHICH PETITIONER WAS A PASSENGER WAS UNREASONABLE BECAUSE THE POLICE OFFICERS DID NOT HAVE PROBABLE CAUSE TO ARREST WHERE THE ONLY INFORMATION THEY HAD WAS A GENERAL NIGHTTIME DESCRIPTION OF AN AUTOMOBILE AND THE NUMBER AND RACE OF ITS OCCUPANTS, AND BECAUSE THE WARRANTLESS SEARCH TOOK PLACE AFTER THE OCCUPANTS OF THE AUTOMOBILE AND THE AUTOMOBILE WERE IN POLICE CUSTODY.

A. The police lacked probable cause to arrest petitioner.

In the state and federal habeas corpus proceedings petitioner has asserted the lack of probable cause for his arrest.[27] Approximately forty-five minutes to one hour

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[26] However, Rule 41(e) specifically provides: "The motion shall be made before trial or hearing *unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion,* but the Court in its discretion may entertain the motion at the trial or hearing. (Emphasis added.) See Pennsylvania Rule of Criminal Procedure 2001(b), effective October 1, 1963.

[27] For purposes of this brief, the issue of probable cause for petitioner's arrest will be discussed in connection with the admissability of evidence seized in connection with the arrest. Although not raised as a separate matter for argument in this brief, if the Court finds lack of probable cause for arrest, then petitioner's conviction must be reversed. *Beck v. Ohio,* 379 U.S. 99 (1964).

after the occurrence of a robbery in another municipality, two police officers received a police car radio report to look for a light blue stationwagon occupied by four colored men (A. 70, 71). The officers observed a car so described travelling toward the scene of the robbery (A. 75). They followed it and, because of traffic conditions, forced it onto a parking lot on a side street (A. 71, 72, 77, 78).

After stopping the vehicle the police officers ordered the four occupants, including petitioner, out of the car and searched their persons. Nothing was found in this search. Thereafter, other police officers arrived at the scene of the arrest[28] and searched the stationwagon (A. 79, 86, 173). Again nothing was found (A. 72, 74). Following the search of the automobile at the arrest scene, petitioner and Lawson, the owner of the car, were taken to the police station in the municipality where the robbery occurred and were questioned. Subsequently, two police officers "went through everything" in the vehicle, which was then parked in the driveway to the police station, but found nothing (A. 89, 107, 108).

The searching officers returned to the police station and again questioned petitioner and Lawson, but neither disclosed any additional information. Thereafter, the officers searched (the third time) the stationwagon, and after an unindicated period of time opened a vent in the heater under the dashboard, and found two .38 caliber revolvers (one loaded with dum-dum ammunition), coins and a glove subsequently identified as having been taken in the robbery of the previous evening, and the cards taken in a robbery committed a week before the arrest (A. 90, 91, 96, 97, 107, 108). Petitioner and the vehicle owner were in custody inside the police station at the time the latter two searches of the vehicle were conducted (A. 97).

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[28]These officers had talked with the teenage informants who had related their observation of the light blue stationwagon circling the service station and parked across the street from the station. They had also talked with the station attendant who said that one of the robbers wore a green sweater and the other a tan trench coat.

[continued]

The constitutional validity of a search without a warrant depends, in the first instance, upon the constitutional validity of the arrest.[29] In *Beck v. Ohio, supra,* this Court announced the test for determining validity of arrest:

> "Whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made,* the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge which they had reasonably trustworthy information were sufficient to warrant a proof prudent man in believing that the Petitioner had committed or was committing an offense." 379 U.S. at 91. (Emphasis added.)

The Court observed:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hind-sight judgment."
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> * * *
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> "When the constitutional validity of an arrest is challenged, it is the function of the Court to determine whether the facts available to the officers at the moment of arrest would 'warrant a man a reasonable caution in the belief that an offense had been committed'. *Carroll v. United States,* 267 U.S. 132, 162. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function." 379 U.S. at 96.[30]

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[29]Further inquiry into the scope of the search, hereinafter discussed, is necessary where the arrest is found to be lawful.

[30]In *Beck,* the Court had the benefit of testimony from the police officers at a pre-trial hearing on a motion to suppress this evidence. The Court noted that the record of the testimony was at best "meager". In the instant matter the late appointment of counsel prevented such a motion to be filed. We must thus look solely to the record of the testimony of the arresting police officers at trial. This record fails to disclose when petitioner was arrested.

Construing the evidence most favorably to the Commonwealth, we find that, at the moment they stopped the stationwagon, the first two police officers had knowledge that a robbery had occurred forty-five minutes to one hour previously in a neighboring municipality and that they had been asked to look for a light blue stationwagon occupied by four colored men, information supplied by two teenagers of unknown reliability and opportunity to observe. If we assume further, that the arrest was made after other officers arrived on the scene supplied with additional information that one of the robbers wore a green sweater and the other a tan trench coat, there was not probable cause for arrest.

There was no information connecting the automobile to the robbery, *viz:* no one saw either of the robbers enter the stationwagon, heard a door slam, a motor start or footsteps. In fact, the attendant did not know how the robbers left the scene.

When this information is evaluated, we submit that it falls far short of standards for probable cause since there was no connection between the stationwagon and the robbery, no physical descriptions of height, weight, markings or other characteristics except skin color. The police had no reason to infer reliability of the informatns, *viz:* they did not know anything of the teenagers' opportunity to observe or the reliability of them or the attendant.

When this information added to the fact that the automobile was proceeding toward the robbery scene when it was stopped two miles distant therefrom at least forty-five minutes later—can it be said that there is probable cause?

McCray v. Illinois, 386 U.S. 300 (1967), relied upon by the court below, is inapposite. On the date of and prior to the arrest the police officers conversed with a reliable informant who had previously furnished information on 20 prior occasions, who advised them that McCray was "selling narcotics and had narcotics on his person and that he could.

be found in the vicinity of 47th and Calumet at this particular time." The officers drove to that location in the police car with the informant. The informant pointed out McCray who, after seeing the police, hurriedly walked between two buildings. Defendant was arrested without warrant for possession of narcotics. A warrantless search of his person uncovered a package of heroin, the possession of which led to his indictment.

The Court distinguished *Beck* on the basis that each of the officers specifically stated what the informer had said and why the officer thought the information was creditable. Here, as in *Beck*, this fundamental information is missing.

The district court relied upon *McCray, supra*, and *Ker v. California*, 374 U.S. 23 (1963). The amount and quality of the information available in *Ker* clearly shows the inadequacy of the information here. In *Ker* the police officers observed a rendezvous between persons trafficing in drugs which was a virtual reenactment of a previous night's staged purchase of drugs by a police officer who had witnessed the event and who participated in the arrest. The identity of the surrounding circumstances to the previous night's sale of narcotics, coupled with information from an informant whose reliability was established, was found to establish probable cause for arrest without a warrant.

Draper v. United States, 358 U.S. 307 (1959), cited by the Court in *Ker*, is frequently cited in connection with the issue of probable cause for arrest. Again we find that the arresting officer had considerably greater information than that available in the instant case. The information was given by a "special employee" of the narcotics squad (paid informer) who always had been accurate and reliable in the past. The informant gave the two alternate times of arrival by train in a certain station, an exact physical description of defendant's personal clothing, that defendant would be carrying a tan leather bag with narcotics and he habitually walked "fast". This knowledge forces the conclusion that probable cause existed.

The strength of the evidence in these cases illustrates the basis for belief that there was no probable cause.[31]

B. The searches and seizures, not being incident to a lawful arrest, were unreasonable.

In his pro se brief filed with the court of appeals, petitioner relied upon *Preston v. United States,* 376 U.S. 364 (1964) in arguing the unreasonableness of the searches and seizures and the subsequent admission of the seized items into evidence at his trial.[32] The court of appeals concluded that petitioner's reliance on *Preston* was misplaced[33] and affirmed the district court's application of *United States v. Dento,* 382 F.2d 361 (3rd Cir. 1967). We submit that this Court should disapprove of *Dento,* apply *Preston* and reverse the lower court.

Preston labelled unreasonable the search of an automobile occupied by Preston and two companions, one of whom was the alleged owner. After giving unsatisfactory explanations for their presence in a business district at 3:00 o'clock, A.M., the three men, including Preston, were arrested for vagrancy and their persons searched for weapons. The men and the car, *which had not been*

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[31] This review of the facts incident to the arrest, the searches and seizures, buttresses the contention that petitioner was prejudiced by late appointment of counsel. With adequate time to prepare, petitioner's counsel could have filed a motion to suppress to test probable cause, as was done in *Beck v. Ohio,* supra, *McCray v. Illinois,* supra, and *Draper v. United States,* supra. The lower court therefore erred when it concluded that "Appellant's contention that his arrest without a warrant was invalid was not involved with the question of ineffective counsel." 408 F.2d at 1192.

[32] Petitioner as a passenger has standing to contest the reasonableness of the search. Although many commentators have concluded that Preston was the owner of the searched automobile, in fact he was a passenger. See Record at 59, 117, 118, *Preston v. United States, supra.*

[33] 408 F.2d at 1192.

searched at the time of the arrest, were taken to the police station. After Preston and his companions were "booked" at the police station, the police officers searched the car and found two loaded revolvers. Unable to open the trunk of the car, they returned to the station and received advice from one of their fellow officers. Returning to the car, they found caps, an illegally manufactured license-plate and other items that could have been used in connection with a robbery.

This Court determined that the search and seizure were unreasonable, noting that when a person is lawfully arrested, the police's right to search without a warrant is justified:

> ". . . to seize weapons and other things which might be used to assault an officer of effect an escape, . . . [or] to prevent the destruction of evidence of the crime. . . ." 376 U.S. at 367.

This Court then flatly stated that:

> "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

This general rule was amplified by the Court:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place. See Stoner v. California, 376 U.S. 483. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be 'fruits' or 'implements' of the crime of vagrancy." 376 U.S. at 367, 368.

Application of the *Preston* doctrine to the instant facts discloses that neither basis for the warrantless search was present. Petitioner and the owner of the vehicle were inside the police station, in no position to obtain weapons, to escape, or to destroy any evidence which may have been lodged in the vehicle. Additionally, unlike *Preston*, a search of the vehicle had already been made *prior to the time petitioner and his companions were taken into the station.*[34]

In *Dento, supra,* relied upon by the courts below, defendant attempted to pass a counterfeit twenty dollar federal reserve note in a food market. The cashier noted that its serial number matched that on a warning list distributed by the U.S. Secret Service. She followed the defendant out of the store and with the aid of a pedestrian obtained the license number of his automobile. Ownership of the vehicle was traced and the information disseminated to police in the locality where the car was registered to defendant under an assumed name. Thereafter, police officers, who knew defendant and his identity observed him

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[34]This Court recently reiterated the holding in *Preston* and affirmed the bases for warrantless search incident to an arrest and its proper extent in *Chimel v. California,* 395 U.S. 752, 762, 763 (1969) as follows: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officers' safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he must gain possession of a weapon or destructible evidence. . . . This is the principle that underlay our decision in Preston v. United States, 376 U.S. 364."

driving his car and motioned him to the side of the road. They saw him lean forward and, apparently, place something under the front seat. He was arrested and taken to the police station. For reasons of safety the car was not searched at the place of arrest, but was searched at a police barracks and counterfeit money seized.

In finding that the search and seizure were reasonable the court of appeals in *Dento* distinguished *Preston* on the basis that:

> "First, unlike Preston, the instant search was substantially contemporaneous with the arrest (the entire arrest and search procedure was completed within twenty minutes). Secondly, there was a reasonable nexus between the offence for which the defendant was arrested for and the search of his automobile, where as in Preston the search was entirely unrelated to the arrest on the charge of vagrancy." 382 F.2d at 365, 366.

Neither of these matters, substantial contemporarity and reasonableness, is an element of the *Preston* rule which excuses the need for a search warrant solely on the necessities implicit in an arrest, *viz*: the suspect may attempt to escape, harm the officer, or destroy evidence. Once the suspect is safely in custody and these dangers no longer exist, a warrant must be obtained.[35]

Wood v. Crouse, 417 F.2d 394 (10th Cir. 1969),[36] involving facts similar to *Dento*, reviewed *Dento* and ably stated the error of that decision:

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[35] See also: *Dyke v. Taylor Implement Mfg. Co., Inc.*, 391 U.S. 216 (1965); *Colosimo v. Perini*, 415 F.2d 804 (6th Cir. 1969); *United States v. Holsey*, 414 F.2d 458 (10th Cir. 1969).

[36] In *Wood*, police were advised to look out for a certain described vehicle whose occupants had attempted to utter a check taken by them during a burglary. Police apprehended the vehicle and arrested Wood and a co-defendant. Shortly after the two suspects were taken to jail the vehicle was taken to the police station, where a search within twenty minutes of the arrest uncovered many checks taken in the previous burglary were seized.

"This court cannot be persuaded by such artificial attempts at distinction without a difference. The Court in Preston in no way indicated that the time factor, *i.e.*, the precise time period between arrest and search, was to be controlling. In fact, the Cout did not indicate the amount of time involved except to note that the search was 'soon after' the defendants had been booked at the station. Timing is significant only in the sense that the search is either at the time of the arrest or it is not; if it is not, it is irrelevant whether the elapsed time is twenty minutes or twenty hours. Rather, the crucial distinction, clearly indicated in Preston, is that if the search is not made at the time of the arrest, but is conducted at a later time when the vehicle is in custody and its occupants in jail, then the justification for an incidental search, *e.g.*, the need to preserve evidence, protect the arresting officers, and prevent escape, no longer obtains and a warrant must be secured. Obviously, the absence or presence of a justification for the search will not depend solely upon whether the delay is brief or lengthy. Accordingly, it is the existence or nonexistence of a justification for a warrantless search—not the mere passage of time—that is determinative.

"The second distinction attempted in Dento, namely, analysis of the nature of the relationship between the offense prompting the arrest and the later search, can have significance in determining whether the search was reasonable only as it relates to probable cause. The court in Dento must have intended to indicate that the subsequent search is valid when closely related to the reason for the arrest because when so related there is probable cause for the search. *Cf.*, United States v. Butenko, 384 F.2d 554, 566 (3d Cir. 1967), vacated, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. The difficulty with that position is that it misconceives the function of probable cause in this context. Thus, the fact that officers have probable cause does not dispense with the requirement of a search warrant. Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). Consequently, it is not

> the existence of probable cause, but the presence of factors justifying the failure to procure a warrant that is critical. When so viewed it becomes apparent that the relationship between the offense and the search is of no consequence since that relationship can have little bearing on the feasibility of the first obtaining a search warrant.
>
> "In brief, both distinctions propounded in Dento overlook the fact that a search without a warrant is valid if incidental to an arrest only because the need to protect the officers, and other similar practical considerations, justify an exception to the general requirement that a warrant is a precondition to a valid search. When the justification is lacking, as in the case at bar where the vehicle was in police custody and its occupants in jail, then regardless of the time involved or the existence of probable cause for the search, a search without a warrant is simply not incident to the arrest. We must therefore conclude 'that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible.' Preston v. United States, 376 U.S. at 368, 84 S.Ct. at 884." 417 F.2d at 397, 398 (footnote omitted).

We urge this court to disapprove *Dento, supra,* and reverse the lower court's refusal to apply *Preston.* The search of the vehicle occupied by petitioner and the seizure of items therefrom were unreasonable under the Fourth and Fourteenth amendments. Once petitioner and his companion were taken into the station house, the police officers were no longer in danger and the suspects could not destroy evidence in the automobile. The searches, thereafter, and the seizures were necessarily remote and could be lawfully made only with a search warrant.[37]

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[37]The circuit court held: "Thus, the failure to file a pre-trial motion to suppress the evidence as to the revolvers was not prejudicial because, on the merits, it would undoubtedly have been decided against appellant. More importantly, the lower court and the district

[continued]

III.

THE ADMISSION IN EVIDENCE OF DUM-DUM BULLETS SEIZED FROM PETITIONER'S HOME WAS NOT HARMLESS ERROR WHERE THE BULLETS WERE MATCHED TO THOSE TAKEN FROM A REVOLVER SEIZED IN A PRIOR UNREASONABLE SEARCH AND THE POLICE OFFICER WAS PERMITTED TO TESTIFY REGARDING THE EFFECT OF SUCH BULLETS ON A HUMAN BODY.

Following petitioner's arrest, the police obtained a search warrant and searched the residences of each of the four occupants of the automobile (A. 126). Searches of the homes of the other suspects did not result in any seizures (A. 126, 127). Petitioner's home was searched approximately eight hours after the arrest and a brown leather revolver holster, one box of .33 caliber Smith & Wesson cartridges and some loose .38 caliber cartridges were seized (A. 127, 128, 131).

No pre-trial motions to suppress this evidence were filed. At the first trial in early September of 1963, petitioner's lawyer objected to the introduction of the .38 caliber ammunition. The objection was sustained (A. 82). The basis for the objection and for sustaining the same are not disclosed in the record.

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court *did* examine this particular issue on the merits and concluded the evidence was admissible." 408 F.2d at 1193 (emphasis by the court).

The district court's review, in one paragraph, of this contention refers to no facts and cites *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Ker v. California, supra*, 281 F.Supp. at 100.

The lower state court's discussion of the issue erroneously states that within "a few minutes" of the arrest the "stolen articles and guns used in the robbery were found". The court does not refer to any decision of this Court on the matter of searches and seizures but concluded, citing a state case, *Commonwealth v. Smith*, 201 Pa. Super. 511, 193 A.2d 778 (1963), that "immunity from unreasonable search is personal and a defendant cannot object to the search of another's premises or property." This was erroneous. *Preston v. United States, supra.*

In petitioner's second trial on the same charges, the Commonwealth offered the seized ammunition into evidence: Petitioner's then counsel, referred the court to the exclusion of this evidence at the earlier trial (A. 82),[38] and objected on the grounds that: (1) the evidence was irrelevant (A. 82) and (2) the search warrant did not describe specifically the items seized.[39] Apparently, the search warrant was available at trial (A. 129) but was lost before the state habeas corpus hearing and has not been found.[40]

The federal district court assumed that the warrant was invalid and treated the admission of the ammunition as constitutional error.[41] The circuit court made a similar

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[38]Mr. Tamburo only became aware of the existence of the search warrant on the morning of trial (A. 130).

[39]The state trial court overruled this objection on the grounds that petitioner's counsel had failed to file preliminary motions before trial in the form and within the time required by the Pennsylvania Superior Court and that, in fact, a search warrant was unnecessary anyway. (A. 130, 131).

[40]The testimony at trial contains the following:

> Question. (Petitioner's counsel) "Do you have the search warrant here in court?
>
> Answer. (Officer Haverly) Yes sir." (A. 129)

Judge Graff, however, in his opinion in the state habeas corpus proceedings, stated: "Unfortunately, this search warrant is not available and was not at the time of trial." (A. 267)

[41]281 F.Supp. at 98, n.4, referring *inter alia*, to the following testimony:

> Question: (Petitioner's counsel) "You didn't know that there were going to be any bullets in the Chamber (sic) house when you went there, did you?
>
> Answer: (Officer Haverly) No sir.
>
> Question: You were just there to see what you could find, is that right?
>
> Answer: Right.
>
> Question: There is nothing on that search warrant that in any way indicates you were looking for bullets, is that right?
>
> Answer: No sir." (A. 132)

assumption.[42] Both courts then held that the violation of the Fourth Amendment was harmless error under *Chapman v. California, supra.*

In *Chapman* this Court stated the test of harmless error:

> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The *Chapman* court amplified its ruling relating to harmless error made in *Fahy v. Connecticut,* 375 U.S. 85 (1963):

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless. Certainly error, constitutional error, is illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it, a burden to show that it was harmless. It is for that reason that the original common law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement and *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24, 25.

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[42] The circuit court also quoted the state habeas corpus judge to the effect that the ammunition was admissible if it had a reasonable relation to the search. 408 F.2d at 1194, n.26, 1195.

We recognize that this Court, not having the warrant before it, may conclude that the record is inadequate on this issue since it does not manifest what, if any, language appeared on the face of the warrant describing the subject of the search. If the court so finds, we submit this forms further proof of the circuit court's failure to observe the criteria of *Townsend v. Sain, supra.*

In petitioner's trial one police officer was permitted to testify that during the search of petitioner's residence he found a brown leather holster, containing one box of thirty-three .38 caliber Smith & Wesson cartridges and some loose .38 caliber cartridges some of which were loaded with dum-dum bullets (A. 127, 128). The bullets were admitted into evidence (A. 128, 129). The police officer then testified that the cartridges could have been used in the two revolvers, exhibits 1 and 3. Thus petitioner alone, of the four tried, was linked with two revolvers.[43] We submit that no court could find that this error was harmless.

But this evidence and testimony was not the only prejudice suffered by petitioner as the result of the illegal search. The searching police officer testified that some of the cartridges contained dum-dum bullets, the first that he had seen in his twenty-seven years' experience (A. 132). Another police officer testified that four dum-dum bullets, exhibit 8, were removed from one of the revolvers found in the search of the automobile (A. 132, 133).

Further prejudice ensued when one of the police officers described the effect of a dum-dum bullet as contrasted with a regular bullet for a .38 caliber revolver:

> Question: (Prosecutor) "The bullet, itself, what is the difference between the Dum-dum shown in the long shell, and the regular bullet, shaped bullet, in the short?
>
> Answer: (Officer Haverly) Well, you take that bullet will go right through you; take that Dum-dum bullet, it will make a hole going in and a bigger hole going out.
>
> Question: This Dum-dum flattens out when it gets in your body?
>
> Answer: If it hits an obstruction of any kind like a bond." (A. 128)

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[43]The only other evidence to connect petitioner with the revolver was the testimony of the witness Havacon who identified petitioner as one of the robbers and asserted that he had been threatened with a chrome plate revolver similar to exhibit No. 1.

The district court believed that the other evidence was adequate to support petitioner's conviction,[44] but completely ignored the patently prejudicial effect of the bullets which forged the conclusive link between petitioner and the revolvers and formed the basis for the inflammatory "dum-dum" remarks by the police officer. Without the benefit of a transcript of the prosecutor's closing argument to the jury, we can only speculate as to what he may have said about the evidence.[45] But the police officer's description of their effect on the human body, in itself, can only be viewed as prejudicial.

The circuit court and district court erred in finding the recited testimony and the admission of the seized evidence as error—harmless beyond a reasonable doubt—since this evidence and testimony must have contributed to petitioner's conviction.

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[44]The district court stated: "In the light of the eyewitness identification of relator, the recognition of the revolvers, the glove full of change and the personal cards found in the stationwagon, and the factor of the green sweater, we are convinced that beyond a reasonable doubt the alleged error committed in the admission of the .38 caliber bullets was harmless." 281 F.Supp. at 99.

[45]Unlike the instant matter where the opening and closing remarks of counsel for the Commonwealth and the defendants were not transcribed, the appendix to the opinion of the court in *Chapman* quotes at length the statements and references of the prosecutor to the prejudicial matter. Thus, we are unable to determine what use the prosecutor made of the inferences to be drawn from petitioner's possession of a holster and the dum-dum bullets.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

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